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No. 89-1028

# In The
# Supreme Court of the United States
# October Term, 1989

**CSX TRANSPORTATION, INC.,**

*Petitioner,*

*v.*

**BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,**

*Respondents.*

## PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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Both the Federal Respondents and Respondent Brotherhood of Railway Carmen oppose review by this Court of the Court of Appeals' decision solely on the ground that review at this time would be premature in light of the remand pro-

ceedings currently pending before the Interstate Commerce Commission.[1]

Petitioner CSX Transportation, Inc. ("CSXT") respectfully submits that the Court should grant the petition and review now the D.C. Circuit's erroneous interpretation of a central provision of the Interstate Commerce Act for three reasons: (1) The Court of Appeals' mistaken reading of ICA § 11341(a) will neither be cured nor clarified as a result of the pending remand proceedings; (2) The erroneous interpretation has already been relied upon by other courts and, unless corrected promptly, will continue to affect future judicial decisions and private business plans in ways contrary to our national transportation policy; and (3) The possibility that, on remand and subsequent review, the ICC's authority to supersede provisions in collective bargaining agreements that would impede approved rail consolidations might be upheld as a result of provisions of the ICA other than §11341(a) will not resolve the problem created by the D.C. Circuit's erroneous interpretation of that section. As a result of the Court of Appeals' decision, ICC-approved rail consolidations found to be in the public interest can nonetheless be blocked by provisions in any private agreement.

1. There is little likelihood that the Court of Appeals' erroneous interpretation of § 11341(a) will either be cured or clarified as a result of the remand proceedings pending before

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[1] Respondent Brotherhood of Railway Carmen also halfheartedly suggests that the petition should be denied because it does not meet the "imperative public importance" criterion set forth in S. Ct. Rule 11, governing review of a case pending in a Court of Appeals "before judgment is given in that court." Brief of Union Respondents in Opp. at 11 (Nos. 89-1027, 89-1028). The union offers no argument in support of this assertion, and Rule 11 is plainly inapplicable. The D.C. Circuit entered its judgment in this case on July 25, 1989. Pet. App. 29a.

As petitioner has demonstrated, review of the Court of Appeals' decision is amply warranted under the standards set forth in S. Ct. Rule 10.1 (a) and (c) because that decision's interpretation of ICA § 11341(a) conflicts with decisions of both this Court and other Courts of Appeals and is manifestly contrary to the Act's terms and legislative history. The Court of Appeals' erroneous interpretation of this central provision of the ICA threatens to undermine the achievement of the national transportation policy of fostering and encouraging railroad consolidations found by the ICC to be in the public interest.



the ICC or on subsequent review in the D.C. Circuit. The Court of Appeals instructed the Commission on remand to consider only two specific issues: (1) whether the immunity conferred in ICA § 11341(a) from "all other law" includes immunity from the Railway Labor Act, and (2) whether the Commission and its arbitrators have the authority to supersede provisions of collective bargaining agreements that would impede a transaction as a result of the labor protection provisions of the ICA, found in § 11347, and the terms of the Commission's standard labor protection conditions. Pet. App. 25a-26a. The D.C. Circuit did not authorize the Commission to consider or address on remand the court's holding that the scope of § 11341(a)'s immunity does not extend to include private contracts, such as collective bargaining agreements.

The Commission, in requesting comments from the parties and other interested persons on remand, has adhered to the Court of Appeals' mandate.[2] The Commission has indicated that it intends to address: (1) whether § 11341(a) operates to override the Railway Labor Act and (2) the impact of Commission approval of a transaction subject to labor protection obligations under § 11347 and the Commission's standard labor conditions upon the rights and remedies of parties under the Railway Labor Act and existing collective bargaining agreements.[3] At the public voting conference held on February 9, 1990, the Commissioners similarly indicated their understanding that they were bound by the Court of Appeals' interpretation of § 11341(a) in these proceedings.[4] Accordingly, neither the Commission's decision on

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[2] Indeed, the Commission has announced that it has acquiesced in the court's interpretation of § 11341(a) until such interpretation is reversed by this Court or reconsidered by the Court of Appeals. *Brandywine Valley R.R. —Purchase—CSX Transportation, Inc.*, 5 I.C.C.2d 764, 772 n.5 (1989), *appeal docketed*, No. 89-1503 (D.C. Cir. Aug. 21, 1989).

[3] *CSX Corporation — Control — Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, Finance Docket No. 28905 (Sub-No. 22) (served Sept. 20, 1989), at 1.

[4] Transcript of Voting Conference in *CSX Corporation — Control — Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, Finance Docket No. 28905 (Sub-No. 22) (Feb. 9, 1990), at 48-49.

remand nor the Court of Appeals' review of any such decision is likely to shed any additional light on the issue of the proper interpretation of the scope of § 11341(a) as it relates to contractual obligations.[5] While the Federal Respondents have informed this Court that the Commission "expects to create a fuller record on which to defend its decision if, and when, the case returns to the court of appeals" (Brief of Federal Respondents in Opp. at 11), such "fuller record" will not deal with the legal issue presented in the instant petition.

As a result, the Court of Appeals' erroneous interpretation of ICA § 11341(a) is ripe for review at this time and is unlikely to be affected by the remand proceedings in the ICC or subsequent D.C. Circuit review.

2. Any delay in reviewing the Court of Appeals' decision will continue to allow that court's mistaken construction of § 11341(a) to infect other judicial and regulatory proceedings. Already, two appellate panels have approvingly cited the D.C. Circuit's holding, without engaging in any independent analysis of the language or history of that section. *Railway Labor Executives' Ass'n* v. *I.C.C.*, 883 F.2d 1079 (D.C. Cir. 1989); *Brotherhood of Locomotive Engineers* v. *I.C.C.*, 885 F.2d 446 (8th Cir. 1989). As noted above, the ICC has also acquiesced in the D.C. Circuit's holding in administrative proceedings pending before it without any independent statutory analysis. *Brandywine Valley R.R. Co.*

The Court of Appeals' decision, until reviewed and reversed, also jeopardizes any plans of railroads to implement restructuring transactions such as mergers and consolidations to which § 11341(a)'s immunity provisions apply. Rail carriers know that, in light of the D.C. Circuit's ruling, they will inevitably be faced with claims by rail unions that the proposed transaction can be implemented only after the interminable bargaining procedures of the Railway Labor Act have been fully exhausted because the transaction allegedly conflicts with the seniority clauses, scope provisions, or other terms in existing collective bargaining agreements. As a result, transactions that would further the public interest and the achievement of the national transportation policy may be delayed and additional litigation may be generated until this Court corrects the D.C. Circuit's erroneous interpretation of ICA § 11341(a).

[5] There would appear to be little chance that the D.C. Circuit will reconsider and correct its interpretation of § 11341(a) when it reviews the Commission's decision on remand in view of the fact that petitions for rehearing and suggestions for rehearing *en banc*, filed by CSXT and Norfolk and Western Railway Company and Southern Railway Company (petitioners in No. 89-1027) following the Court of Appeals' decision, were denied. Pet. App. 30a, 31a.



3. The Federal Respondents argue against review of the D.C. Circuit's decision at this time because of the possibility that the Commission on remand may adopt an alternative basis to ICA § 11341(a) for allowing approved consolidations to go forward without exhaustion of the Railway Labor Act bargaining procedures; "[i]t is entirely possible that the Commission may adopt a position on one or more of these alternatives that may obviate the difficulties entailed by the court of appeals' decision. . . ." Brief for the Federal Respondents in Opp. at 11. Such an alternative would be based on the ICA's special labor protection provisions, found in § 11347, and on the Commission's standard labor protection conditions.

The possibility that the D.C. Circuit's erroneous interpretation of § 11341(a) may not ultimately prevent carriers from implementing consolidations found to be in the public interest, notwithstanding restraints emanating from collective bargaining agreements, does not reduce the importance of this Court's review of the Court of Appeals' July 25, 1989, decision. The D.C. Circuit did not merely hold that Congress intended collective bargaining agreements to be outside of the immunity provisions of § 11341(a); its holding was far broader and could be construed to encompass all manner of contractual relationships:

> Nowhere does [§ 11341(a)] say that the ICC may also override contracts, nor has it ever, in any of the various iterations since its initial enactment in 1920, included even a general reference to "contracts," much less any specific reference to CBAs.

Pet. App. 12a.

As a result of the D.C. Circuit's decision, rail carrier consolidations — and the public interest — are potentially hostage to a host of private contractual restrictions, including the type of contractual charter provisions superseded in *Schwabacher* v. *United States*, 334 U.S. 182 (1948). *See also City of Palestine, Texas* v. *United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978) (consolidating carrier required to comply with agreement to maintain 4.5% of its employees in Palestine, Texas, because relief from such agreement not "necessary" to consolidation); *Altman* v. *Central of Ga. Ry Co.*, 488 F.2d 1302 (D.C. Cir. 1973) (ICC consolidation approval supersedes charter provisions governing payment of dividends). This Court should review the Court of Appeals' decision now in order to resolve this fundamental issue of the scope of the authority conferred on consolidating carriers under the ICA.

## CONCLUSION

For the reasons set forth herein and in CSX Transportation's petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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